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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1053

ANTHONY PROVENZANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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As to Question 1 (Pet., pp. 2-3, 22-28)

The Government's brief (pp. 3-4) does not dispute that, at the very least, the juror Cassidy was undeniably shown to have failed to disclose the facts reflected in the statements made to the F.B.I. by the Government witnesses McConnell and DeMarco concerning the November 1961 U.A.W. strike incident, and that such facts would have been disclosed if the juror had truthfully answered the questions put on the *voir dire* (Pet., pp. 18, 24-5). McConnell specifically testified that he made that statement "in relation to Mr. Cassidy" (518a),* and he recited in the statement that the "crossing" of the U.A.W. picket lines by petitioner's local Teamster union occasioned "considerable discussion" (622a).

In an attempt to minimize the significance of the facts shown by the McConnell and DeMarco statements, the Government (br., pp. 3-4) seeks to give the impression that Cassidy's involvement in the strike incident could not be the predicate for a finding of bias on his part in petitioner's trial. The Government, however, overlooks the crucial circumstance that it was the very local Teamster union of which petitioner was president and which, as was widely known in the plant, represented the Teamsters engaged in picking up the finished cars at the Ford plant, that was responsible for the "crossing" of the U.A.W. picket lines.

Beyond its mere say-so that the facts thus shown in relation to the 1961 U.A.W. strike incident were not "of a kind requiring disclosure [by the juror] a year and a half later" (Gov't br., p. 4, fn. 1), the Government makes no

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* Figures in parentheses followed by the letter "a", unless otherwise specified, refer to the pages of petitioner's printed appendix in the Court of Appeals.

attempt to address itself to the question here presented as to the criteria for determining whether a juror's misrepresentation and non-disclosure of material facts bearing on his qualifications to serve, and pertinent to the exercise of defense counsel's right of peremptory challenge, are sufficiently prejudicial to warrant the granting of a motion for a new trial after conviction.

Chief Judge Bazelon, of the Court of Appeals for the District of Columbia, recently reviewed various decisions on the subject as follows, in a dissenting opinion in *Daniels* v. *United States,* 355 F. 2d ——, decided February 11, 1966:*

> "The case law has established three basic criteria to guide the trial court in ruling on motions for new trial based on improper responses at voir dire. First, if it is shown that the juror was biased against the losing party, a new trial is always required. No specific prejudice need be proved once it is clear that the constitutional guarantee of an impartial jury was violated.[9] Second, if it appears that the nondisclosure 'resulted from a purposefully incorrect answer or from deliberate concealment,' a new trial must be granted.[10] Since the juror has violated his oath and impaired the statutory right of peremptory challenge, the materiality of the withheld information is usually considered irrelevant. Finally, if the

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* The majority decision in *Daniels* v. *United States, supra,* upheld the denial of a motion for a new trial in a narcotics case, made on the basis of a juror's failure to disclose that she was employed as a check numberer in the Treasury Department. The decision is clearly distinguishable on its facts, since the jury list showing the juror's occupation had actually been furnished to defense counsel and was available to him on the *voir dire,* and her employment had no connection with the Bureau of Narcotics of the Treasury Department.

> nondisclosure was innocent, the trial court has some discretion in deciding whether to order a new trial. Its judgment, however, should be based upon a consideration of the reasons for the juror's failure to disclose[11] and of the materiality of the undisclosed information."[12] [Footnotes omitted.]

In a footnote (fn. 12), Judge Bazelon reviewed the tests governing materiality where "the nondisclosure was innocent" and stated as follows:

> "Two basic tests have evolved to measure the materiality of nondisclosure. The first is whether the trial judge would have excused the juror out of an abundance of caution had the information been revealed on voir dire. *The second is whether, in the opinion of the court, disclosure of the information would have resulted in a peremptory challenge to the juror.*" (Emphasis supplied.)

The Government significantly has nothing to say in its brief as to the prejudicial effect of the juror Cassidy's failure to disclose the facts relating to the strike incident, by way of operating, at least, to defeat the exercise of petitioner's counsel's right of peremptory challenge.

Contrary to the impression sought to be conveyed by the Government (br., p. 6), petitioner's motion for a new trial was not limited to a claim of prejudice on the part of the juror Cassidy specifically directed against petitioner personally. The claim that the juror Cassidy had misrepresented, and failed to disclose, material facts on the *voir dire*, relating to his qualifications to serve (4a), was manifestly in no way so limited. The claim that the juror was actually prejudiced was likewise not so limited. It was thus supported by affidavits (33a-34a, 37a, 39a, 40a, 42a,

48a, 50a) and testimony (Pet., pp. 11, 12, 14) showing Cassidy's bias against the Teamsters and Teamster officials as a group, in addition to his bias against petitioner personally; and the affidavits (11a, 35a) as well as the testimony (Pet., p. 13) specifically dealt with the 1961 strike incident. Further, the amended notice of motion (55a) referred to "the undisclosed prejudice" of the juror Cassidy without the qualification suggested by the Government, and the order of the District Court setting the issues down for a hearing likewise directed, in general terms, "that defendant support his allegations of alleged prejudice on the part of a juror by oral testimony * * *" (99a).

The Government's brief likewise fails to meet the issues presented by the second undisputed instance of the juror Cassidy's concealment of material facts—*i.e.*, his failure to disclose his conceded exposure to adverse publicity concerning petitioner (Pet., pp. 25-6, 27-8). Without any evidentiary basis for impeaching the record showing that Cassidy indicated a negative response to the questions relating to publicity (Pet., p. 25), the Government (br., p. 4) merely repeats the District Court's speculative suggestion that the court reporter might have erred in noting only five prospective jurors other than Cassidy who raised their hands when the question as to publicity was asked by the Court. The Government further overlooks the fact that Cassidy *specifically denied* having read any newspaper publicity about petitioner except for an article in that morning's newspaper which simply stated that the jury would be picked (23a-24a).

The Government's further contention (br., pp. 4-5) that Cassidy's disclosure "that he was an officer of a United Automobile Workers local union" necessarily apprised petitioner of Cassidy's prior exposure to adverse publicity

concerning petitioner, is a *non-sequitur*, and is in any event untenable in view of Cassidy's specific denial of any exposure to such publicity.

As to Question 2 (Pet., pp. 3, 28-32)

The Government does not dispute that this case squarely raises the question whether there is any judicial precept or policy against the post-trial interrogation of a juror in a situation such as that here presented. Its sole contention, predicated on *United States ex rel. Daverse* v. *Hohn*, 198 F. 2d 934, 938-9 (3d Cir.), cert. den. 344 U. S. 913, seems to be that there is such a policy, at least in the Third Circuit, which operated to preclude the interrogation of the juror Cassidy in this case. The question is thus directly presented as to the continuing validity of the rule enunciated by this Court in the early case of *Mattox* v. *United States*, 146 U. S. 140, 149, that "a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial".

The other Federal cases cited by the Government (br., p. 5) as support for the alleged judicial policy here invoked by it, are all distinguishable as involving matters essentially inhering in the jury's deliberations or verdict. *Cf. United States* v. *Chereton*, 309 F. 2d 197, 201 (6th Cir.), cert. den. 372 U. S. 936 (claim that four of the jurors made a mistake as to the charges on which they voted for guilt); *Medina* v. *United States*, 254 F. 2d 228, 231 (9th Cir.), cert. den. 358 U. S. 846 (claim that one of the jurors was constrained to vote for guilt by reason of the trial court's "Allen" charge); *United States* v. *Nystrom*, 116 F. Supp. 771, 777 (W. D. Pa.), aff'd 237 F. 2d 218 (3d Cir.) (claim that two of the jurors joined in the verdict of guilty only by reason of undue influence exerted by other jurors). In

State v. *LaFera*, 42 N. J. 97, which is also cited by the Government (br., p. 5), testimony of jurors was in fact received, and the portion of the Court's opinion on which the Government apparently relies, dealt with a special rule of the New Jersey Supreme Court prohibiting out-of-court interviews of any juror, without leave of court, "with respect to *the verdict or deliberations of a jury*" (emphasis supplied).

As to Question 3 (Pet., pp. 3, 32-4)

The Government's contention (br., p. 6) that "The court's finding did not rest . . . on an adverse inference based upon his [petitioner's] failure to call additional witnesses", is squarely refuted by the District Court's own statement of its rationale (Pet., pp. 20-21). The Government overlooks the fact that the District Court's error in drawing an adverse inference against petitioner because of his failure to call additional potential witnesses was a major predicate for its finding that petitioner had not sustained his burden of proof. Indeed, the Government itself (br., p. 2), in its statement of facts in support of the District Court's decision, refers to the fact "that other persons who were said to have been present were never called to testify by petitioner".

As to Question 4 (Pet., pp. 3, 34-6)

The Government's suggestion (br., p. 6) that petitioner's motion for a new trial was not predicated on allegations of prejudice on the juror's part against the Teamsters as a group, has already been answered (*supra*, pp. 3-4). Its further contention (br., p. 6) that such prejudice on the juror's part is of no materiality, squarely presents the question here raised whether a showing of strong prejudice on the part of a juror against a group of which the

defendant on trial is a prominent member, may be disregarded on the theory that the prejudice is not shown to be directed against the defendant individually.

As to Question 5 (Pet., pp. 3-4, 36-41)

Without any attempt to meet the issues here raised, and with but a cursory reference to the evidence, the Government ignores the effect of the undisputed facts concerning the 1961 strike incident, the complete absence of any testimony by the juror Cassidy in denial or explanation of the facts as testified to by petitioner's witnesses, the testimony of the six witnesses other than the two to whom the Government alone refers, who testified for petitioner, and the corroboration provided by the Government's own witnesses (Pet., pp. 9-19, 38-41).

In invoking the shibboleths of "credibility" and "demeanor", the Government further overlooks the fact that the District Court made no finding that petitioner's witnesses were lying, and that its decision rested primarily on its conclusion that it could not "rely" on the testimony of petitioner's witnesses Giannone and Bladen "except to the extent that there is convincing corroboration", and that "The corroboration offered was under all of the circumstances, at best, minimal" (656a). Its conclusion was materially influenced by its erroneous view that it was incumbent on petitioner to produce additional corroborating evidence from other potential witnesses alleged to have been present at the incidents in question (Pet., pp. 20-21, 32-4).

The Government's characterization (br., p. 2) of petitioner's witness Bladen as being "personally interested in obtaining reversal of petitioner's conviction", is not supported by the record. The District Court characterized Bladen as "a partisan" and "not a disinterested witness",

but apparently only because he had given petitioner's attorneys the names of other potential witnesses and had introduced them to the witness Donnelly (587a, 639a, 652a). It is clear, however, that an otherwise disinterested witness cannot be branded as "a partisan" merely because he cooperates to the extent of naming or introducing other potential witnesses. *Cf. Fisher* v. *United States*, 231 F. 2d 99, 106 (9th Cir.).

The Government's further speculative suggestion (br., p. 3) that knowledge of Cassidy's bias must have come to petitioner's attention during the trial, is likewise in no way supported by the record, and is squarely refuted by the affidavit and testimony of the witness Giannone (42a-44a, 121a, 134a-136a), as well as by the affidavits of petitioner and his trial counsel (45a, 59a, 77a).

CONCLUSION

For all of the reasons advanced in the petition and in this reply brief, the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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